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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 471

CHARLES STEVENSON, HEYWARD BURRELL, FRANK HARLEY, *Petitioners*

vs.

RICHARD REED, ARTHUR PAGE, DANIEL TYLER, ET AL., TRUSTEES

and

FIRST BAPTIST CHURCH OF MARSHALL HEIGHTS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Supreme Court of the United States:

Petitioners pray for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia vacating petitioners default judgment which had obtained for more than 2 years.

OPINION BELOW

The opinion of the court below has not, yet, been officially reported. A copy of the opinion and judgment is hereunto annexed as the Appendix.

JURISDICTION

The judgment of the Court of Appeals was issued on the 20th day of June, 1957. The jurisdiction of the Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether after one year, eleven months and 16 days the respondents may be entitled to the setting aside of the default judgment to quiet title to real estate taken against them.

2. Because no notice was given them under Rules 5 (a) and (b), and 55 (b) (2) of the Federal Rules of Civil Procedure as to the entry of said default.

3. Because respondents allegedly did not receive notice of pre trial pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rules 13 and 14 of the local Rules of the United States District Court for the District of Columbia, even though said notice was mailed to them.

4. Does Rule 60 (b) (6) afford relief to litigants whose counsel failed to be conversant with the progress of their litigation for a period of more than a year?

5. Does the decision of the District Court, affirmed by the Court of Appeals conflict with the decision of this court in the case of Klappott vs. United States, 336 U.S. 942?

6. Should the construction of Rule 55 (b) of the Federal Rules of Civil Procedure be expanded so as to embrace pre trial proceedings?

7. Does the decision of the District Court, affirmed by the Court of Appeals, conflict with the case of U.S. vs. Karahalias, 2 Cir. (1953), 205 F. 2d 331, at Page 334?

STATEMENT OF THE CASE

Petitioners are founders of the First Marshall Heights Baptist Church, having founded said church on August 18th, 1938. That on said date petitioner, Burrell's wife was elected as the first clerk of said church. That thereafter on September 30th, 1938, petitioner, Stevenson was elected to the chairmanship of the Deacon Board while petitioner, Burrell, was elected Senior Deacon of said church, and on November 15th, 1938, petitioners were elected to the Board of Trustees of said church. Petitioners out of their own funds purchased two lots upon which subsequently the 13 original members paid for the material used in the construction of said church and the petitioners herein, of their own labor, actually built the said church, the completion of which was in the month of August 1940. That thereafter the said 13 members together with 107 new members worshipped in said edifice until the month of October, 1951. At which time respondents joined in a conspiracy to remove the petitioners from their respective offices in said church. That the said conspiracy culminated in the respondents ousting the petitioners from their respective offices and expulsion from the church. That in furtherance of the said conspiracy the respondents did on the 7th day of April, 1951, join in a certificate of incorporation, without the authority of the congregation of the church. As a result of the foregoing the petitioners filed their complaint in the United States District Court for the District of Columbia in Civil Action No. 1996-53, to Quiet Title to Real Estate and praying among other things for the removal of respondents from the occupancy of Lots 14 and 15 in Square 5334, and that title to said real estate be quieted in petitioners. To this complaint the respondents duly filed their answer denying all material allegations of the complaint and asserting title in the respondents, First Baptist Church of Marshall Heights, District of Columbia, Inc. Issues were accordingly joined. Petitioners are record titleholders. On October 20th, 1954,

notices of pre trial were mailed by the Assignment Commissioner, D.C., to all of the parties to the litigation. On October 28th, 1954, pursuant to said pre trial notices, counsel for petitioners and defendant, American Security and Trust Co., appeared for pre trial of the cause and the issues raised by the pleadings. Neither respondents nor their counsel appeared for pre trial, even though notices were mailed to them by the said Assignment Commissioners. Upon pre trial, the pre trial judge dismissed the complaint against defendant, American Security and Trust Co., and directed that a default judgment be entered against the respondents. Accordingly, a default judgment was entered against the respondents and in favor of petitioners, on November 2, 1954. That thereafter respondents taking no action to set aside the default judgment, the petitioners thereupon on November 5th, 1955, obtained a Writ of Assistance, a year and a day after the entry of the default judgment.

On November 7th, 1955, the respondents filed their motion in the District Court to vacate the default judgment or in the alternative to stay the Writ of Assistance. Thereafter on November 9th, 1955, the District Court vacated the Writ of Assistance but took no affirmative action on the motion to vacate the default judgment. The petitioners prosecuted an appeal from the action vacating the Writ of Assistance, but the Court of Appeals affirmed the action of the District Court in a per curiam opinion. Said decision is reported in 98 U.S. App. D.C. 262, 235 F. 2d 21.

Thereafter, on the 28th day of September, 1956, petitioners filed their complaint in the District Court in Civil Action No. 3965-56 to construe the scope and effect of the said default judgment, and on the 18th day of October, 1956, the respondents filed in Civil Action No. 1996-53, what they designated as an amended motion to vacate default judgment, said amended motion contained no additional reasons from those expressed in their original motion to vacate default judgment. Thereafter, on November

29th, 1956, the District Court without taking evidence, heard the amended motion to vacate default, and on December 6th, 1956, the said court entered an order granting the motion to set aside the said default judgment. Upon appeal the Court of Appeals affirmed the judgment of the District Court on the 20th day of June, 1957. It is from this judgment of the Court of Appeals that petitioners prosecute this petition for a Writ of Certiorari.

STATUTE AND RULES INVOLVED

The Rules of Federal Civil Procedure are found in 28 U.S.C.A., the pertinent Rules of Federal Civil Procedure and local Rules of the United States District Court for the District of Columbia are set out as follows:

Federal Rules of Civil Procedure:
- Rule 5
- Rule 15 (a)
- Rule 55 (b)
- Rule 60 (b)

District Court Rules:
- Rule 12 (b)
- Rule 14 (i)

Section 57, Judicial Code, U.S.C.
- Title 28, Sec. 118

REASONS FOR GRANTING THE WRIT

1. The conflict among and within the circuits

The judgment of the court below is in direct conflict with the decision of the second circuit in the case of United States vs. Karahalias, 205 F. 2d 331, rehearing at Page 334, where Judge Learned Hand reversing himself, in the light of Klappott vs. United States, 336 U.S. 942, observed while analyzing the Klappott case, Supra,

> "in that case as in the case at bar forcible obstacles were interposed to prevent, or at least greatly to

impede, a naturalized citizen making his defense to an action to cancel his citizenship. The court divided as to the result, the minority holding that Klappott's inaction was neglect—, for which he offered an excuse and that Sub-section 6 did not toll the limitation of the Rule upon any kind of neglect, whatever the excuse might be."

Judge Learned Hand further stated:

"on the other hand the majority held that Sub-section (6) might, and in the case before it did, toll the limitation when the citizen's inaction resulted from forcible obstacles imposed upon his defense. So far we were in accord; but we failed to note our divergence from the majority's reasoning for they held that Klappott's inaction was not neglect at all."

"Moreover, we must retract the construction, we put upon Sub-section (6), and hold that no neglect however excusable will survive the limitation of Rule 60 (b), . . . On the other hand since Karkahalias inaction was not neglect it was not subject to any limitation. Therefore, we hold that as before that if Karkahalias can prove that he was prevented from returning to the United States from the time he learned of the action to cancel his citizenship, the judgment must be opened."

In the instant case there is an affidavit in the record filed by the Assignment Commissioner, D.C., in which he swore that he mailed notice of pre trial to counsel for respondents the same as he did to counsel for the other litigants. Yet, the District Court failed to require the respondents to produce evidence to show that in fact they did not receive the pre trial notice.

The failure of the District Court to compel the respondents to prove their contention of lack of pre trial service is in conflict with the decision of this court in the case of Klappott vs. United States, 336 U.S. 942, there this court in modifying its decision in 335 U.S. 601, said:

"The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with direction to receive evidence on the truth or falsity of the allegation contained in the petition."

In the instant petition the respondents do not present a case such as disclosed by the facts in Klappott case, supra. Respondents' counsel showed neglect in their failure to inquire as to the status of the law suit for a period of over a year. This is a neglect which is subject to the 1 year limitation and cannot be cured by Sub-section (6). If it were to be assumed that the inaction of the respondents warranted consideration under Sub-section (6), the procedure has been set by this court in the Klappott case, Supra, and it was incumbent upon the District Court under the strength of this case to compel the respondents to take testimony to prove the allegations of the amended motion to vacate default judgment.

The opposing view taken by the Court of Appeals in its un-explicated per curiam opinion is that the operation and effect of Rule 60 (b) is left to the discretion of the trial judge and that their construction will be disturbed only for abuse.

2. The importance of the questions involved

Probably the best evidence of the importance of the issues raised in this case is the serious conflict which has developed in the per curiam decisions of the United States Court of Appeals for the District of Columbia Circuit aligned against the Klappott and Karahalias cases, Supra. It is of grave importance for a party litigant to know when he may treat a default judgment as an enforcible judgment.

The Court of Appeals for the District of Columbia Circuit has misconceived the importance of the issues presented by the record to such an extent that it has failed to write an opinion setting forth its reasons for the judgment entered.

In the case of Massa vs. Jiffy Products Co., 9 Cir. (1957), 240 F. 2d 702, the court took the position that the default judgment was sufficiently embracing and that no oral testimony was needed in order to give the judgment finality.

The amended motion of the respondents to vacate default judgment raises the question as to the force and effect of Rules 5 (a) and (b), and 50 (b) (2) of the Federal Rules of Civil Procedure. There is nothing in the opinion of the Court of Appeals which answers any of the issues resulting from the said amended motion of the respondents. The opinion merely states that we find no abuse of discretion. Such opinions are not very helpful in the all important construction of the Federal Rules of Civil Procedure.

There is nothing in the opinion of the Court of Appeals to show how that court met the jurisdictional issue raised by the record and showing that the inaction of the respondents extended beyond the 1 year limitation prescribed under Rule 60 (b).

It is crystal clear that courts are powerless to act under Rules 60 (b), (1), (2), (3), (4), where the inaction of the defaulter has continued for more than a year. In so far as construction and operation of Rules 60 (b), (1), (2), (3), (4), are concerned, the courts cannot act until the defaulter meets the jurisdictional test. Even this court is limited and restricted in its jurisdiction as to the application of the said Rule 60 (b). To state the proposition tersely, this is a court of broad authority but limited jurisdiction and can proceed only when the law permits and in the manner in which the law permits.

It seems to be an unchallenged construction of Rule 60 (b) as aforesaid that if the respondents had hoped to prevail in their motion to set aside the default judgment, the burden was upon them to bring themselves within the exception provided in Subsection (6) of Rule 60 (b) and to satisfy the court that Rule 60 (b), (1), (2), (3) were inapplicable.

If the opinion of the Court of Appeals had held as a matter of law that, apart from the particular facts alleged in respondents' motion, that the default judgment was void for failure to grant respondents a hearing, there would be no need for a remand to take proof of respondents allegations. The lower courts should not have assumed the respondents' verity as a matter of law, especially where the record itself contains strong contradictory evidence.

In the absence of a holding that the default judgment must be vacated irrespective of circumstances alleged in respondents motion to vacate that judgment, and it is assumed that the motion makes a case entitling respondents to consideration under Subsection (6) of Rule 60 (b), we submit that the order vacating the default judgment was premature, until respondents established by clear proof the allegations of their amended motion.

3. The decision of the court below is believed to be erroneous

In the light of the detailed opinions written by the distinguished justices of this court in Klappott vs. United States, 335 U.S. 601 and its reconsideration, 336 U.S. 942, together with the able reconsideration of Judge Learned Hand of the Second Circuit in 205 F. 2d at Page 334, it is evident that the District Court failed to follow the procedure outlined by the above decisions.

It is significant that neither the Court of Appeals nor the District Court gave any reason for their decisions. The respondents stated in their amended motion that the default judgment violated Rules 5 (a), (b), and 55 (b), (2) of the Federal Rules of Civil Procedure. These allegations raise the question as to the proper functions of these Rules. It is admitted that the respondents were in default for failure to appear at pre trial. The question arises therefore as to whether said Rule 5 (a) entitled the respondents

as a default party, to service of the entry of a default judgment.

The further question arises as to whether one in default for failure to appear at pre trial is entitled to any relief under said Rule 55 (a). In this respect the decision of the Court of Appeals is in sharp conflict with a decision of the 5th circuit in the case of Bass vs. Hoagland, 172 F. 2d 205, Cert. denied 338 U.S. 816. There the court took the position that the operation and effect of Rule 55 cease and become inoperative after issues are joined by the pleadings.

Basically the only allegations before the lower courts asserting grounds to vacate the default judgment, were those appearing in the amended motion of the respondents. The allegations laid in the said amended motion were simple unsworn statements. The lower courts gave credence to these allegations against the sworn affidavit of Richard L. Collins, Assignment Commissioner, in which he swore that notice of pre trial was mailed to counsel for respondents. The basic question presented to this court is whether the amended motion survived the limitations contained in Rules 60 (b), (1), (2), and (3). Rule 60 (b), (4), and (5) are not involved. If we indulge the assumption that Rule 60 (b), (6), apply to the amended motion of the respondents then the lower courts have flagrantly failed to apply the rule laid down by this court in the Klappott case, 336 U.S. 942.

CONCLUSION

It is submitted that in view of the importance of the questions raised by the record relative to 1, the jurisdictional limitation under Rule 60 (b), (1), (2) and (3); and 2, the consideration of and procedure established under Subsection (6) of Rule 60 (b), and the obvious failure of the lower courts to follow the mandate of this court as aforesaid, impel this court to effectuate the proper con-

struction of the pertinent Federal Rules of Civil Procedure, heretofore evolved by this court.

WHEREFORE, by reason of the foregoing the petitioners urge the granting of this petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13709

CHARLES STEVENSON, *et al.*, APPELLANTS

v.

RICHARD REED, *et al.*, and FIRST BAPTIST CHURCH OF MARSHALL HEIGHTS, a corporation, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 20, 1957

Mr. Everett L. Edmond submitted on the brief for appellants. *Mr. James Washington, Jr.*, also entered an appearance for appellants.

Mr. George A. Parker, with whom *Messrs. Barrington D. Parker* and *Horace O. Pollard* were on the brief, submitted on the brief for appellees.

Before EDGERTON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

PER CURIAM: This appeal is from an order entered December 6, 1956, vacating a default judgment entered November 2, 1954. We find no error or abuse of discretion.

Affirmed.